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Supreme Court, U.S.
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No. 04-842

IN THE

Supreme Court of the United States

MARC E. BACON, *et al.*,

Petitioners,

v.

HONDA OF AMERICA MFG., INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Honda of America Mfg., Inc., is owned in part by Honda Motor Co., Ltd., which is a publicly held corporation. No other publicly held company owns 10% or more of the stock of the Respondent.

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INTRODUCTION

This case is not an appropriate candidate for review by this Court. The Sixth Circuit's decision does not conflict with any decision of this Court or any other circuit court of appeals. Nor does this case present an important question of federal law that needs to be settled by this Court. To the contrary, the Sixth Circuit simply, and correctly, applied Rule 23(a) criteria and well-established precedent to a highly particularized set of facts to affirm two decisions of the District Court, which were thorough and soundly reasoned in their own right. Contrary to Petitioners' assertions, the Sixth Circuit opinion is consistent with the decisions of other circuits and does not erect a barrier to those presenting legitimate claims of discrimination.

It has long been a requirement that plaintiffs seeking to certify a class in an employment discrimination case must identify a particular employment practice alleged to discriminate unlawfully against each member of the class. Contrary to that well-established law, Petitioners contend that they are not required to identify such a specific promotion practice of Respondent, Honda of America Mfg., Inc. ("HAM"). Petitioners contend, instead, that they can establish Rule 23(a) commonality for a putative class of all black associates by attacking HAM's promotion processes in the abstract – namely, by introducing meaningless statistics that ignored HAM's application requirements, objective eligibility standards and tests, and other actual promotion criteria and practices. In rejecting their contentions, the lower courts merely applied well-established precedents of this Court and other federal courts to the particularized facts regarding HAM's promotion practices.

Petitioners also assert that the lower courts erred in granting HAM's motion for summary judgment because they did not permit Petitioners to prove their individual discrimination claims

based solely on a pattern-or-practice theory. Again, contrary to Petitioners' misrepresentations, the lower courts merely followed settled precedent, consistent with the holdings of other courts that have addressed this issue. Moreover, both lower courts explicitly recognized that the pattern-or-practice evidence could still be considered in connection with plaintiff's individual disparate treatment claims. Indeed, the courts considered the supposed pattern-or-practice evidence the Petitioners offered, and determined, as a matter of law, that it was insufficient to establish a *prima facie* case of discrimination against HAM.

Simply put, neither Petitioners' flawed statistical analyses nor their misstatements as to the holdings of the Sixth Circuit and the District Court present appropriate grounds for granting certiorari in this case. The Sixth Circuit's opinion is fully consistent with this Court's precedents and with the holdings of countless other federal courts. Accordingly, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

A. The Courts Below Correctly Denied Class Certification and Granted Summary Judgment to HAM on Petitioners' Individual Claims.

This case was carefully and correctly decided below. Petitioners moved for certification of a class of all black associates who worked at HAM at any time over a 23-year period – a group ranging from non-exempt clerical workers and Production Associates to exempt managers. (R.91; Joint Appendix 381).[1] After first holding a four-day evidentiary hearing, the District Court issued a detailed ruling denying

1. Citations to pleadings and decisions in the District Court are identified by District Court docket number as "R.____." Where available, citation to the Joint Appendix filed in the Sixth Circuit also is included.

Petitioners' motion for class certification. (R.140; Joint Appendix 2202-57) (reproduced as Appendix C to the Petition for Writ of Certiorari; also available at 205 F.R.D. 466). The District Court later granted HAM's Motions for Summary Judgment on both of the Petitioners' individual claims, through a 97-page opinion. (R.160; Joint Appendix 102-98) (reproduced as Appendix D to the Petition for Writ of Certiorari). The Sixth Circuit affirmed both the District Court's class certification and summary judgment decisions. 370 F.3d 565 (reproduced as Appendix B to the Petition for Writ of Certiorari). Petitioners' request for en banc review was denied on September 17, 2004.

The undisputed factual record – as both the Sixth Circuit and the District Court recognized – shows that HAM had well-defined criteria for promotions related to the specific business needs of individual departments. Petitioners' attempt to depict HAM as a company where race discrimination runs rampant through supposedly unbridled subjective decision-making simply does not square with the undisputed facts found below.

HAM is a manufacturing company that operates four plants in Marysville, East Liberty, and Anna, Ohio. Each plant builds different products using different technologies. The Anna Engine Plant ("AEP") manufactures engines, brake and suspension components, drive shafts, and crankshafts; the Marysville Auto Plant ("MAP") builds Accord and Acura automobiles; the East Liberty Plant ("ELP") builds Civic automobiles; and the Motorcycle Plant builds motorcycles, motorcycle engines, and four-wheel utility vehicles. (Joint Appendix 1550-51).

HAM's manufacturing processes and the workers who perform them are organized into 31 separate production departments, each of which has a specialized function. The work performed in those departments varies widely, from operating cupolas that pour molten metal into molds in the AEP Ferrous

Casting Department, to welding vehicle frames in the MAP Weld Department, to hand-tooled painting of motorcycles in the Motorcycle Paint/Plastics Department. (Joint Appendix 2724-26).

The manufacturing and assembly processes in the production departments are performed by non-exempt workers called Production Associates. Production Associates are assigned to specific departments and perform their processes in teams led by Team Leaders, the next level of non-exempt worker. At the same non-exempt level as Team Leaders are Production Staff, who work on technical and production issues. (Joint Appendix 2727). In production departments, Coordinators, who are first-level exempt associates, supervise Team Leaders and Production Staff. (Joint Appendix 1552). During the 1990 to 1998 time period, nearly three-quarters of HAM's average total workforce of 11,106 associates were non-exempt Production Associates, Team Leaders, and Production Staff. (Joint Appendix 3470).

Because HAM's production departments perform specialized functions, the work performed by Team Leaders and Production Staff in those departments necessarily differs. (R.98; Joint Appendix 1552). In each department, Team Leaders and Production Staff must understand unique processes, procedures, and equipment. Thus, experience in the department is essential to successful performance of those jobs. As a result, only Production Associates working in a particular production department are eligible for promotion to Team Leader or Production Staff in that department. (Joint Appendix 2728).[2]

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2. Accordingly, postings and announcements of Team Leader and Production Staff openings in a production department were made only in that department. (Joint Appendix 1567).

For Production Associates, the most common promotion is to Team Leader or Production Staff in the associate's home production department. From July 1994 to July 1999, 1,059 Production Associates were promoted. More than 92 percent of those promotions were promotions of Production Associates to Team Leader or Production Staff in their respective home production departments. The few remaining promotions were to exempt or non-exempt positions in "support" departments pursuant to two distinct systems: Career Interest Applications ("CIAs") and Quality Pools. (Joint Appendix 3471, 1558-59).

Petitioners' claim that HAM promotion decisions are highly discretionary and subjective (*e.g.*, Petition at 2) is flatly contradicted by the undisputed record. 205 F.R.D. at 477. Throughout the relevant time period, HAM had clearly delineated promotion processes, which varied according to the special manufacturing, safety, and business needs of its individual departments, for making promotions to Team Leader and Production Staff. The vacant Team Leader or Production Staff positions were posted in the department in which they occurred. *Id.* at 472. The promotion systems all had application procedures. *Id.* Each department was required to incorporate certain objective minimum standards, such as attendance, time in department, and lack of recent serious disciplinary infractions. Other criteria, such as trade tests or structured interviews specific to the activities of the department, were combined with the minimum objective criteria to determine which applicants the department should promote from its own pool of candidates. (Joint Appendix 2751-56). HAM's Administration Department then exercised a "check function" by reviewing promotions and confirming that the departments followed their stated processes. (Joint Appendix 2722-23, 2751). In short, HAM's *actual* promotion processes bear no resemblance to Petitioners' unsupported claim that promotions were based on the unfettered discretion and subjective whims of individual managers.

HAM offered detailed evidence of promotion processes in five production departments to illustrate its departmental promotion processes. That evidence – which Petitioners did not even attempt to rebut – revealed eligibility standards, evaluative criteria, and selection devices that varied among departments according to their individual business needs.[3] Promotions processes were structured to evaluate qualifications related to the different kinds of work performed in the departments. For example, MAP Assembly tested applicants' knowledge of torque wrenches, decibel levels, and hearing protection, and authorized access to overhead conveyors. (Joint Appendix 3103-12, 3278-84, 3316-26, 3373-80). The MAP Paint Department tested associates about hazardous materials storage, confined space standards, and departmental lockout-tagout procedures. (Joint Appendix 3575-80, 3624-30, 3662-67). *See also* 205 F.R.D. at 471-72. Petitioners presented no evidence in the courts below that HAM departments failed to follow their promotion practices.

Both the District Court and the Sixth Circuit carefully reviewed Petitioners' claim that HAM decision-making was entirely subjective and rejected that claim. *See* 370 F.3d at 577-79; 205 F.R.D. at 477. As the Sixth Circuit succinctly stated: "We do not accept the argument that Honda's decision-making process is entirely subjective because, as a matter of fact, it is not." 370 F.3d at 571.

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3. Promotion practices not only varied *among* departments, they varied *within* departments over time. (Joint Appendix 3044-49, 3103-12, 3575-80, 1681-89).

B. Petitioners' Statistical Evidence Is Fundamentally Flawed and Does Not Support Their Arguments for a Writ of Certiorari.

During this case, Petitioners have steadfastly refused to address the actual practices that governed promotion and other employment decisions at HAM. Instead, they have relied on supposed statistical analyses – analyses that admittedly disregard HAM's actual practices and criteria – in order to paint an inaccurate picture of HAM systems. The District Court reviewed Petitioners' statistical evidence and found it irrelevant to class certification issues. *See* 205 F.R.D. at 470. The Court later revisited that evidence in determining HAM's motions for summary judgment and found that it did not raise any genuine issue of material fact. *See* R. 160 (Joint Appendix at 149-60). The Sixth Circuit affirmed the District Court's rejection of that evidence. 370 F.3d at 577-79.

A proper statistical analysis must analyze a specific employment practice and demonstrate that such practice was the cause of the exclusion of applicants for promotions because of their membership in a protected group. *See, e.g., Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 994 (1988). Critically, Petitioners' statistician, James McClave, conceded that he gave no consideration to any practices actually used in making promotions at HAM and did not perform analyses that tested any of the actual criteria that the undisputed facts show HAM used. (Joint Appendix 1853-74).

Moreover, an "impressive litany of high standard deviations is only as impressive as the underlying hypothesis from which the deviations were generated." *E.E.O.C. v. Chicago Miniature Lamp Works*, 947 F.2d 292, 301 (7th Cir. 1991). The standard deviations touted by Petitioners (*e.g.*, Petition at 3-6) are meaningless because they do not relate to actual employment practices at HAM.

Dr. McClave's promotion "analyses" treated associates who *never* applied for promotion as equally likely to be promoted as those who actually applied. His "analyses" erroneously took broad groups – either all HAM associates, regardless of job, or all Production Associates, regardless of department – and simply counted how many associates in the groups were promoted, by race, within a certain period, regardless of their actual eligibility for promotion or application for promotion. Moreover, he scorned any effort to isolate the effect of applications, tenure, or any other objective promotion criteria. (Joint Appendix 2424-27). The analysis further ignored the crucial significance of department assignment in promotion decisions, even though it was undisputed that only Production Associates in a particular production department were eligible for promotion to Team Leader or Production Staff in that department. (Joint Appendix 2388-2413). As a result, Dr. McClave's "bottom line" analyses included associates who were not eligible because they did not work in the department where the promotions occurred, they did not apply, and they did not meet stated eligibility criteria. (Joint Appendix 2388-2413). The analyses also reflected other absurd assumptions – such as deeming all clerical workers eligible for promotions given to associates with engineering degrees working on an engineering career path, or counting associates who had left HAM years *before* promotions occurred as being in the pool of associates deemed eligible for those promotions. (1853-54, 1857). In addition, although Dr. McClave admitted that non-discriminatory factors such as education, training, and seniority may have affected promotions at HAM, he made no effort to eliminate the effect of those factors. (Joint Appendix 1830-36).

Dr. McClave's "segregation" study (Joint Appendix 441-43) did not test *any* promotion system at HAM. Rather, it was simply a *quota* analysis, and thus is irrelevant to proof of either

common practices of discrimination or genuine issues of material fact on Petitioners' individual claims. Title VII does not require that employers achieve a uniform distribution of any group of workers by race across job categories. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652 (1989); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977).

Dr. McClave also purportedly "tested" certain criteria, such as attendance, time in department, counselings, and transfers. (Joint Appendix 449-50, 503-05). However, he did not know whether the purported criteria he "tested" were actually used or to whom the criteria were applied. He therefore either "tested" non-existent criteria, applied criteria incorrectly, or disingenuously attributed to HAM the voluntary choices of HAM associates.[4] (370 F.3d at 577-79; Joint Appendix 2428-55). Likewise, Dr. McClave's critiques of "subjective" processes at HAM were factually baseless. For example, although he opined that counseling was "used subjectively to the detriment

4. HAM has a voluntary transfer system for Production Associates by which they can transfer, on the basis of seniority, from one production department to another. (Joint Appendix 111, 1561-62). Thus, Production Associates could use the voluntary transfer system to obtain the shift or type of work they prefer in a different department or for any number of other reasons reflecting their personal choice. Indeed, Petitioners themselves testified that they had voluntarily applied for and received transfers under this system. (Joint Appendix 111-12, 1717-27, 1825-26). Nonetheless, Dr. McClave persisted in mischaracterizing statistical evidence showing that black associates had received such voluntary transfers more frequently than non-black associates as evidence that HAM had intentionally transferred black associates in order to prevent them from obtaining sufficient department seniority to become eligible for promotion to team leader or production staff. (Joint Appendix 2436-41). The District Court correctly held that this evidence did not support a finding that HAM was engaging in race discrimination. (Joint Appendix 182-86).

of black employees," he did not examine whether comparable behavior received comparable treatment. (Joint Appendix 2446-47). Although he concluded that HAM "made exceptions [to tenure requirements] for non-blacks significantly more often than it did for blacks," he did not understand that these "exceptions" involved instances in which the tenure requirement did not apply, nor did he attempt to limit his comparisons to similarly situated associates. (Joint Appendix 143-44, 2441-46).

Dr. McClave admittedly never determined whether a neutral employment practice that operated to disqualify Petitioners from promotion had a disparate impact upon black associates. (Joint Appendix 1853-74). He also never determined whether any criterion that adversely affected Petitioners was applied differently to similarly situated black and non-black associates. (Joint Appendix 2388-2413).

Proper statistical analyses must focus on the treatment of qualified persons, show a significant disparity, and "eliminate the most common nondiscriminatory explanations for the disparity." *Barnes v. Gencorp Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990); *see also Wards Cove Packing Co.*, 490 U.S. at 651-55. Dr. McClave did not even attempt to meet these standards.

Equally importantly, for class certification purposes, he did no analysis intended to gauge whether any common, class-wide mechanism of discrimination existed. Nothing in Petitioners' baseless statistics can overcome the Sixth Circuit's sound reasoning that, absent evidence of a purely subjective, company-wide promotion process, a plaintiff seeking class certification must identify a specific and common discriminatory mechanism across the departments for which class certification is sought. 370 F.3d at 571-72; *see Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998) (en banc) ("[I]t is not every

common question that will suffice, however; at a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality. What we are looking for is a common issue *the resolution of which will advance the litigation.*") (emphasis added). Such statistics also do not and cannot undercut the Sixth Circuit's finding that Petitioners' undisputed personal choices – which rendered them ineligible for promotion during most of their HAM careers – rendered them atypical, and thus precluded certification under Rule 23(a)(3). 370 F.3d at 572-73.

REASONS FOR DENYING THE PETITION

A. The Sixth Circuit Opinion Affirming the Denial of Class Certification Is Not in Conflict with the Court's *Watson* Decision.

Petitioners first contend that the Sixth Circuit should have ignored this Court's holding in *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982), and conflated the reasoning of *Falcon* with *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 991, 999 (1988), so as to eviscerate the "rigorous analysis" of commonality that *Falcon* requires. That argument is unfounded and does not justify granting the Petition.

The Sixth Circuit correctly distinguished between *Falcon's* concern with the question of class membership and *Watson's* focus on the unrelated issue of the threshold showing necessary to make out a prima facie case of discrimination:

> Plaintiffs cannot avoid the heavy lifting of showing eligibility for class certification by conflating two exceptions to separate rules for adjudicating discrimination cases. An entirely subjective decision-making process may, theoretically, allow different

> kinds of employees to be in the same class—a question of class membership (*Falcon*). For the entirely separate purpose of establishing a *prima facie* case of disparate impact, mixed objective and subjective standards may be considered to be purely subjective (*Watson*). *See* 42 U.S.C. § 2000e-2(k)(1)(B)(i).
>
> The two exceptions are not interchangeable, however. Plaintiffs are trying to demonstrate eligibility for class membership, which is governed by the "entirely subjective" requirement in *Falcon*. They must prove that the potential members of the class actually have something in common: they are subject to random decision-making. As an entirely separate matter, the Court has been cognizant of the difficulties inherent in proving discrimination and therefore set a relatively low bar for establishing a *prima facie* case. *See, e.g., Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) ("The burden of establishing a prima facie case of disparate treatment is not onerous."). Therefore, counting mixed criteria as subjective furthers the goal of making sure that valid claims get to a jury. The constructive subjectivity in *Watson* cannot substitute for the actual and complete subjectivity required for the exception in *Falcon* because the cases deal with two unrelated legal issues: class membership and the elements of a *prima facie* case. We hold that the *Falcon* requirement is not met because the plaintiffs have not shown that the wide range of class members are all subject to the same, exclusively-subjective, decision-making process.

370 F.3d at 571-72.

The Sixth Circuit therefore recognized that *Falcon* and *Watson* address fundamentally distinct issues. That reading is consistent with the decisions of virtually every court that has addressed the issue presented in this case. As the District Court noted (R.140, p.23; Joint Appendix 2224), those courts have held that commonality cannot be found based upon subjective criteria unless the criteria are *entirely* subjective.[5]

Moreover, Petitioners' reliance on language in *Watson* to support their contention that they need not identify any specific practice or isolate any specific practice in their statistical analysis also is misplaced. Indeed, the Court in *Watson* directly rejected such a contention:

> Especially in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.
>
> Once the employment practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.

Watson, 487 U.S. at 994 (citation omitted). This holding is entirely consistent with *Falcon* and the subsequent case law requiring plaintiffs to identify a specific practice that applies to

5. *See also Boyce v Honeywell, Inc.*, 191 F.R.D. 669, 676 (M.D. Fla. 2000); *International Union v. LTV Aerospace and Defense*, 136 F.R.D. 113, 121-22 (N.D. Tex. 1991).

all members of the purported class, a requirement that Petitioners have failed to meet in this case.

The Sixth Circuit's ruling also was firmly grounded in the undisputed facts presented during the class certification proceedings before the District Court. That undisputed evidence shows that, at HAM, promotions are made pursuant to different, highly structured processes within individual departments that largely apply objective criteria and that are then checked by HAM's Administration Department. Requiring applications, limiting eligibility to associates already in a department, and scoring trade tests, among other criteria, are *objective* actions, as the Sixth Circuit and the District Court found.[6] (370 F.3d at 577-79; R.140, pp. 23-24; Joint Appendix 2224-25). As even Petitioners' own expert, Dr. Philip Way, conceded, at HAM *different* departments used *different* criteria at *different* times, and individual associates had *different* interests in promotion. (Joint Appendix 1876-78, 1890, 539). In such circumstances,

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6. Petitioners also imply that HAM's promotion processes should be considered to be entirely subjective because certain objective eligibility standards were applied subjectively. However, Petitioners' claim is based upon Dr. McClave's flawed "analyses," which were found to be irrelevant because they failed to test the actual criteria employed by HAM departments in making promotions. Moreover, even if Petitioners' false characterization of certain particular objective practices as "subjective" is accepted, there is still no basis to relieve Petitioners of their obligation to identify a specific allegedly discriminatory promotion practice that applies to all members of the purported class. There is no evidence that *every* putative class member was exposed to each of those allegedly subjective processes. For example, there is no evidence that Petitioners were ever denied a promotion due to performance ratings. It is for this reason that Petitioners eschew identifying *any* "mechanism of discrimination" that purportedly adversely affected all class members.

courts overwhelmingly have held that commonality does not exist.[7]

Contrary to Petitioners' assertions, neither *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001) (which is simply the second round of appeal in *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir. 1999)), nor *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), accepted the conflation of *Falcon* and *Watson* proposed by Petitioners. Indeed, *Robinson/Caridad* was based on a premise that managers had unfettered discretion in making promotion decisions, *see* 191 F.3d at 287, and *Cox* rested upon a finding of entirely subjective promotion practices, neither of which existed at HAM. *See* 784 F.2d at 1557.

Similarly, the Petitioners' claim that *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), is inconsistent with the Sixth Circuit decision below ignores that the common issue presented in *Thiessen* was not one of subjective decision-making, but rather of a company-wide policy of removing older employees whom high level management believed were blocking the advancement of younger, newly recruited employees. 267 F.3d at 1105. *Thiessen* – which in any

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7. *See Bradford v. Sears, Roebuck and Co.*, 673 F.2d 792, 796 n.4 (5th Cir. 1982); *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 277-80 (4th Cir. 1980); *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980); *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1311 (9th Cir. 1977); *Webb v. Merck & Co., Inc.*, 206 F.R.D. 399, 401, 408-09 (E.D. Pa. 2002); *Carson v. Giant Food, Inc.*, 187 F. Supp. 2d 462, 471 (D. Md. 2002); *Zachery v. Texaco Exploration and Prod., Inc.*, 185 F.R.D. 230, 239 (W.D. Tex. 1999); *Levels v. AKZO Nobel Salt, Inc.*, 178 F.R.D. 171, 177 (N.D. Ohio 1998); *Reyes v. Walt Disney World Co.*, 176 F.R.D. 654, 657-58 (M.D. Fla. 1998); *Abrams v. Kelsey-Seybold Med. Group, Inc.*, 178 F.R.D. 116, 128-29, 132-33 (S.D. Tex. 1997).

event was decided under the different class standards applicable to claims brought under the Age Discrimination in Employment Act, 29 U.S.C. § 626(b), 267 F.3d at 1102, 1105 – never addressed the issue of whether a claim of partially subjective promotion processes could serve as the basis for certifying a class across different departments and plants that use different promotion criteria.

Finally, Petitioners' reliance on *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003), is entirely misplaced. *Staton* was a case certified by the District Court for settlement purposes. While finding commonality to exist largely based on the representation of the parties, the *Staton* court never considered the issue of whether a class could be certified across departments having different promotion practices based on a claim that *some* of the promotion criteria were subjective. Because *Staton* never reached this question, it cannot be inconsistent with the Sixth Circuit's careful reasoning below.[8]

The nub of Petitioners' argument is that this Court should adopt a lower standard for certifying an employment class than for certifying classes in other cases. This Court, however, has consistently and resoundingly rejected that argument. *See Falcon*, 457 U.S. at 160-61; *East Texas Motor Freight System Inc. v. Rodriguez*, 431 U.S. 395, 405-06 (1977). Equally important, this Court has insisted that courts not relax Rule 23 requirements to achieve a social policy purpose. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

Petitioners' attempt to depict the Sixth Circuit decision as an outlandish departure from the norm thus is wholly unfounded. The Sixth Circuit simply reviewed undisputed evidence of

8. The other cases cited by Petitioners (Petition at 10-11) predate *Falcon*, and therefore cannot support Petitioners' argument that *Falcon* was modified by *Watson*.

HAM's actual promotion processes and applied this Court's instructions that class certification issues require "a rigorous analysis," that "actual, not presumed, conformance with Rule 23(a) remains ... indispensable," and that the mere allegation of racial discrimination does not mean that Rule 23 requirements are satisfied. *Falcon*, 457 U.S. at 157, 160-61. Accordingly, there is no need for this Court to issue a writ of certiorari in this case.

B. The Sixth Circuit Opinion Affirming the Grant of Summary Judgment in Favor of HAM Is Consistent with this Court's Precedents and the Holdings of Other Circuits that Have Addressed the Use of "Pattern-or-Practice" Proof in Individual Cases.

The second question raised by Petitioners is an equally inappropriate basis for review by this Court. In affirming the entry of summary judgment for HAM, the Sixth Circuit reasoned that pattern-or-practice claims are reserved for class action cases or lawsuits brought by the government because such claims do not "address individual hiring decisions." 370 F.3d at 575. The Court added, however, that "pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework." *Id.* The Court then reviewed Petitioners' pattern-or-practice evidence, including their statistical analyses, before finding that HAM was entitled to judgment on Petitioners' individual claims. *Id.* at 575-79.

Petitioners contend that the Sixth Circuit decision conflicts with other appellate court decisions and with this Court's opinions in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), and *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Such arguments are specious.

By holding that a pattern-or-practice claim is one that can only be litigated once a class action is certified, the Sixth Circuit followed the other circuits that have addressed this issue. *See Celestine v. Petroleos de Venezuella SA*, 266 F.3d 343, 355-56 (5th Cir. 2001); *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 711 (2d Cir. 1998); *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 761 (4th Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999); *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1252 (7th Cir. 1990); *Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043 (5th Cir. 1982); *Williams v. Boorstin*, 663 F.2d 109, 115 n. 38 (D.C. Cir. 1980); *see also Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866-67 n.6 (7th Cir. 1985); *Herendeen v. Mich. State Police*, 39 F. Supp. 2d 899, 905 (W.D. Mich. 1999).[9]

Furthermore, the Sixth Circuit's conclusion is consistent with this Court's prior rulings. This Court has never applied the pattern-or-practice method of proof outside of class actions or cases brought by the government. *See International Bhd. Of Teamsters v. United States*, 431 U.S. 324, 357-60 (1977). Moreover, this Court has specifically noted that "[t]he crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest" because "[t]he inquiry regarding an

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9. Petitioners' argument that the Sixth Circuit decision conflicts with other appellate court decisions is misplaced. In *Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546 (11th Cir. 1986), the Court addressed the appropriate approach to pattern-or-practice claims only after it held that the case should be brought as a class action. *Id.* at 1553-60. *Lujan v. Franklin Cty. Bd. Of Educ.*, 766 F.2d 917 (6th Cir. 1985); *Evans v. Harnett Cty. Bd. Of Educ.*, 684 F.2d 304 (4th Cir. 1982); and *Hardy v. Porter*, 613 F.2d 112 (5th Cir. 1980), all involve actions brought against formerly segregated school districts in which the courts applied this Court's decision in *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-10 (1973). None of those decisions holds that an individual may bring a "pattern-or-practice" claim against a private employer, such as HAM.

individual's claim is the reason for a particular employment decision, while 'at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking.'" *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 877 (1984) (quoting *Teamsters*, 431 U.S. at 360 n.46).

Petitioners appear to argue that the Sixth Circuit's decision is inconsistent with this Court's opinions in *Swierkiewicz* and *Furnco*, because those cases recognize that the *McDonnell Douglas* burden-shifting approach is not the exclusive method of proving discrimination and is to be applied flexibly. To be sure, this Court has acknowledged that the *McDonnell Douglas* test is inapplicable where the individual plaintiff produces direct evidence of discrimination, *Swierkiewicz*, 534 U.S. at 511, and that the *McDonnell Douglas* method was "never intended to be rigid, mechanized or ritualistic." *Furnco Constr. Corp.*, 438 U.S. at 577. There is nothing in *Swierkiewicz* or *Furnco* to suggest, however, that in lieu of the *McDonnell Douglas* formulation a plaintiff may allege an individual pattern-or-practice claim and thereby be relieved of the burden of persuading the jury that the employer intentionally discriminated against that particular plaintiff. *See Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

Nor can Petitioners argue that the Sixth Circuit decision applied a version of *McDonnell Douglas* that was "rigid, mechanized or ritualistic." *Furnco Constr. Corp.*, 438 U.S. at 577. To the contrary, the Sixth Circuit noted that "pattern-or-practice evidence may be relevant to proving an otherwise-viable individual claim for disparate treatment under the *McDonnell Douglas* framework." 370 F.3d at 576. Indeed, the District Court

evaluated in detail the statistical and other evidence that Petitioners claimed supported their pattern-or-practice claim, and found that such evidence failed to raise a genuine issue of material fact on the individual Petitioners' disparate treatment claims. (Joint Appendix 140-71). The Sixth Circuit affirmed the District Court's evaluation with respect to the disparate treatment claims and also specifically discussed the shortcomings of Petitioners' statistical analyses in connection with Petitioners' disparate impact claims. 370 F.3d at 575, 577-79. Accordingly, Petitioners were permitted to offer their evidence, and that evidence was considered. As a practical matter, the determination that a formal pattern-or-practice claim may only be pursued in a certified class action had no meaningful impact on the outcome of the Petitioners' individual claims.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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